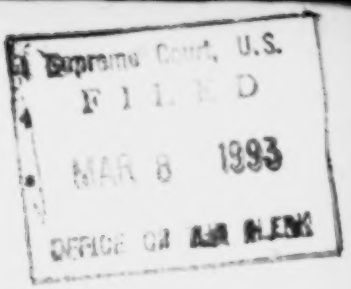
92-1483



No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term 1992

SAMUEL D. McDANIEL,
Petitioner
v.
TED MARTIN AKIN and **GLORIA DAHL AKIN,**
Respondents

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

Petition for Writ of Certiorari

Joseph Colvin
801 Cherry Street
Ft. Worth, Texas 76102
(817) 336-7883
Attorney for Petitioner

Question Presented

May debtors, solvent at all times, use the United States Bankruptcy Laws to avoid payment of interest on their debt?

List of Parties

The names of all parties appear in the caption of the case.

Table of Contents

Question Presented i
List of Parties ii
Table of Contents ii
Table of Authorities iii
Opinions of Lower Courts 1
Statement of Jurisdiction 1
Statutes Involved 2
Statement of the Case 4
Argument 4
Reasons to grant the Writ 5
- Decisions of other Courts of Appeal 6
- Departure from accepted bankruptcy law 6
- Applicable decisions of this Court 8
- Important question of federal law 8
- Abuse of bankruptcy law 9
- Disregard of nonbankruptcy law 9

Prayer 10

Appendix

- Opinion of Fifth Circuit ..... App. 1
- Opinion and order, District Court ..... App. 7
- Judgment, Bankruptcy Court ..... App. 15
- Fifth Circuit Order on Rehearing ..... App. 16
- Bankruptcy Plan ..... App. 17
- Amended Disclosure Statement ..... App. 21
- Order Confirming Plan ..... App. 26
- Letter, Debtor's attorney to Petitioner ..... App. 28

Table of Authorities

Cases:

Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985) 5

City of New York v. Saper, 336 US 328, n 7, 93 L Ed 710, 69 S Ct. 554 (1949) 9

Debentureholders, Etc. v. Continental Inv. Corp., 679 F.2d 264 (1st Cir. 1982) 6, 7

In Re Allegheny Intern, Inc. 6

In Re D. C. Sullivan & Co., Inc., 929 F.2d 1 (1st Cir. 1991) 6

In Re Laymon, 117 B.R. 856 (Bkrtcy, W.D. Tex. 1990) 6

Johnson v. Norris 190 Fed. 459 (5th Cir. 1911) 6

Matter of Beverly Hills Bancorp, 752 F.2d 1334 (9th Cir. 1984) 6, 7

Perry Roofing Company v. Olcott, 744 S.W.2d 929 (Tex. 1988) 5

Rio Grande Land & Cattle Co. v. Light, 758 S.W.2d 747 (Tex. 1988) 5

United States v. Ron Pair Enterprises, 489 US 235, 103 L Ed 2d 290, 109 S Ct 1026 (1989) 8

Statutes:

11 U.S.C. § 1129 2

11 U.S.C. § 1129 (a) (7) (A) (ii) 9

11 U.S.C. § 1141 10

11 U.S.C. § 726 2

11 U.S.C. § 726 (a) (5) (6) 8, 9

28 U. S. C. § 1254 (1) 1

Texas Civil Practice and Remedies Code, § 38.001 9

Other Authorities:

Administrative Office of the United States Courts, 52-Week T-Bill Rate Table of Charges 5

Annotation Claim in Bankruptcy as Bearing Interest After Filing of Petition Where There is a Surplus, 27 A.L.R.2d 586 (1953) 6

Opinions of Lower Courts

The Bankruptcy Court did not issue an opinion; its judgment is in the appendix bound with this application (App. 15). The District Court Opinion does not appear to have been published. It is reproduced in the appendix (App. 7). The Fifth Circuit opinion is not published and is reproduced in the appendix (App. 1). The order of the Fifth Circuit overruling Motion for Rehearing on December 4, 1992 is without opinion and is reproduced in the appendix (App. 16).

Statement of Jurisdiction

This Court has jurisdiction under 28 U. S. C. § 1254 (1). This matter began as a proceeding in Bankruptcy Court to enforce the provisions of a Chapter 11 Bankruptcy Plan. The Judgment of the Bankruptcy Court (App. 15) enforcing the plan but denying Petitioner the full amount of his approved claim, was appealed to the United States District Court for the Northern District of Texas and was affirmed by the District Court (App. 7). The District Court judgment was appealed to the United States Court of Appeals for the Fifth Circuit and was reversed (App. 1). The Fifth Circuit granted judgment for the full amount of Petitioner' claim but denied prejudgment interest even though the debtor was solvent at all times and even though the approved bankruptcy plan provided that the Petitioner's claim would be paid in full. Motion for Rehearing was denied December 4, 1992. Denial of prejudgment

interest where the debtor is solvent is contrary to the decisions of other Courts of Appeals and contrary to guiding rules set forth in opinions of this Court; and is wrong both because of reasons of equity and because contrary to the following provisions of the Bankruptcy Code.

Statutes Involved

11 U.S.C. § 1129:

(a) The court shall confirm a plan only if all of the following requirements are met:

* * *

(7) With respect to each impaired class of claims or interests--

(A) each holder of a claim or interest of such class--

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; . . ..

11 U.S.C. § 726:

(a) Except as provided in section 510 of this title, property of the estate shall be distributed--

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title;

(2) second, on payment of any allowed unsecured claim, other than a claim of a kind

specified in paragraph (1), (3), or (4) of this subsection, proof of which is-

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) of this title; or

(C) tardily filed under section 501(a) of this title, if-

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1),(2),(3), or (4) of this subsection; and

(6) sixth, to the debtor.

Statement of the Case

This is a bankruptcy case arising from the efforts of Petitioner to enforce the provisions of an approved Chapter 11 plan that provided that Petitioner's claim would be "paid in full" (Plan, App. 18). Petitioner's claim was a class eight claim pursuant to the Amended Disclosure Statement, (App. 24). The Fifth Circuit has ordered the Petitioner's claim to be paid in full except for post petition, prejudgment interest. The prejudgment interest, by any reasonable standard, is more than the claim itself, and is the subject of this appeal.

Argument

The context of this case is clearly set in the second paragraph of the Fifth Circuit opinion (App. 2):

> This bankruptcy case was apparently instigated in 1982 solely because Judge Akin and his wife did not want to post a supersedeas bond to avoid the judgment her father had been awarded against them in Texas state court for malicious prosecution.. No one challenged the bona fides of the case, however, perhaps because Judge Akin proposed a plan to pay creditors in full following liquidation of estate properties. The plan also provided that the proceeds from Mrs. Akin's trusts would contribute to pay off creditors. According to the debtor's disclosure statement and schedules, the estate was at all

times solvent, having assets of $3.5 million and liabilities of $1.7 million.

And, as also noted by the Fifth Circuit (App. 5), the debtor had paid all of his creditors other than the Petitioner, prior to payments to Petitioner of post petition fees in the amount of $82,000 that the record shows to have begun in April 1983, long prior to this action to enforce the plan provision for "payment in full".

While the lower courts may have had discretion to choose between the federal legal rate of interest and the state legal rate of interest, it is very clear that under the state law of Texas, interest is a part of the debt and is compensation for the use or detention of money, *Cavnar* v. *Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), and that interest is recoverable as a part of the debt in a breach of contract action at the state legal rate (10% compounded annually). *Perry Roofing Company* v. *Olcott*, 744 S.W.2d 929 (Tex. 1988); *Rio Grande Land & Cattle Co.* v. *Light*, 758 S.W.2d 747 (Tex. 1988). The federal legal rate at the time of filing the petition in bankruptcy, March 3, 1981, was 14.39%. Administrative Office of the United States Courts, 52-Week T-Bill Rate Table of Charges.

Reasons to grant the Writ:

This Petition should be granted; (1) because the Fifth Circuit denial of interest in this case is contrary to decisions of other Courts of Appeal; (2) because the denial of interest under the facts of this case is such a departure from accepted bankruptcy law as to call for an exercise of this Court's power of supervision; (3)

because the Fifth Circuit has decided the interest issue in a way that conflicts with applicable decisions of this Court; (4) because if the interest issue presented by this case has not been finally settled by the prior decisions of this Court (and the Fifth Circuit apparently does not think so) this case presents an important question of federal law that should be settled by this Court; and (5) because the decision of the Fifth Circuit permits an abuse of bankruptcy law and a disregard of non bankruptcy law by the solvent debtor.

Decisions of other Courts of Appeal
Departure from accepted bankruptcy law

A sample of the many cases from other Courts of Appeal that conflict with the ruling of the Fifth Circuit in this case are: *In Re D. C. Sullivan & Co., Inc.*, 929 F.2d 1 (1st Cir. 1991); *Matter of Beverly Hills Bancorp*, 752 F.2d 1334 (9th Cir. 1984); *Debentureholders, Etc.* v. *Continental Inv. Corp.*,. 679 F.2d 264 (1st Cir. 1982). And see please, *In Re Allegheny Intern, Inc.*, 118 B.R. 282 (Bkrtcy, W.D. Pa. 1990); *In Re Laymon*, 117 B.R. 856 (Bkrtcy, W.D. Tex. 1990); Annotation: Claim in Bankruptcy as Bearing Interest After Filing of Petition Where There is a Surplus, 27 A.L.R.2d 586 (1953). Even the prior Fifth Circuit law was contrary to the present Fifth Circuit ruling, *Johnson* v. *Norris* 190 Fed. 459 (5th Cir. 1911).

Even if the award of interest where the debtor is solvent be viewed as a matter of discretion, other circuits hold it is an abuse of discretion not to award interest where the debtor is solvent. For example, in

Matter of Beverly Hills Bancorp, 754 F2d 1334 (9th Cir. 1984), the court noted:

> The Trustee has had the use of these funds and has earned interest on them. The record indicates that the debtor will be solvent upon the discharge of all claims, with a net return to shareholders in excess of $4 million. The CPH have been awaiting patiently the complete discharge of their claim, after considerable litigation, for more than ten years. Under these circumstances, we hold that the denial of their claim for post-petition interest was an abuse of discretion.

As noted in *Debentureholders, Etc.* v. *Continental Inv. Corp.*, 679 F.2d 264 (1st Cir. 1982), a case awarding interest on interest due under a contractual provision:

> . . . Finally, the rule is in harmony with the settled English and American law that when an alleged bankrupt is proved solvent the creditors are entitled to receive post petition interest before any surplus reverts to the debtor. New York v. Saper, 336 U.S. 328, 330 n. 7, 69 S.Ct. 554, 555 n. 7, 93 L.Ed 710 (1949); United States v. Bass, 271 F2d 129, 130 (9th Cir. 1959); Littleton v. Kincaid, 179 F2d 848, 27 A.L.R.2d 572 (4th Cir. 1950).

This is also in harmony with the Bankruptcy Code provisions quoted earlier in this Petition which provide that the creditor will be as well off under a Chapter 11 plan as he would be under a Chapter 7 liquidation. The order confirming the plan Petitioner seeks to enforce in this action finds and provides (App. 26):

> 3. Each holder of a claim will receive or retain under the plan property of a value as of the effective date of the Plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under Chapter 7 of the Code on such date;

The holding of the Fifth Circuit makes this finding a false statement because it is clear under 11 U.S.C. § 726 (a) (5) and (6);

> (5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and
>
> (6) sixth, to the debtor;

that if there had been liquidation under Chapter 7, Petitioner would have been paid interest on his claim at the legal rate from the date of filing of the petition in bankruptcy, before the debtor would have received anything. The refusal of the Fifth Circuit to allow interest where the debtor is solvent is a clear violation of the equities incorporated into the provisions of the Bankruptcy Code and is for that reason an abuse of discretion. Furthermore, the lower courts have completely ignored the debtor's recognition (through his attorney) that the exception granting interest where the debtor is solvent applies (App. 29).

Applicable decisions of this Court
An important question of federal law to be settled

While the specific question at issue in *United States* v. *Ron Pair Enterprises*, 489 US 235, 103 L Ed 2d 290, 109 S Ct 1026 (1989) is not the specific question involved in this case, principles set forth by

this Court in that case have application here, particularly the notation that provisions of the Code itself, "embody the principle that 'the trustee is not to have carte blanche to ignore nonbankruptcy law.' " 489 US at 244. And, that an exception to the general rule against recovery of post petition interest allowed post petition interest when the debtor ultimately proved to be solvent. 489 US at 246. The exception allowing post petition interest where the debtor is solvent is also noted in *City of New York* v. *Saper*, 336 US 328, n 7, 93 L Ed 710, 69 S Ct. 554 (1949). This exception seems clearly to have been incorporated into the Code by the Provision of 11 U.S.C. § 726 (a) (5) (6) and 11 U.S.C. § 1129 (a) (7) (A) (ii).

This Court needs to settle the issue: May a solvent debtor use the bankruptcy laws to ignore nonbankruptcy law? The debtor, solvent at all times, has clearly done so in this case, and the reasoning of the Fifth Circuit invites others to do the same.

Abuse of bankruptcy law
Disregard of non bankruptcy law

A solvent debtor has used the bankruptcy laws for purposes of a stay to prevent enforcement of a state court judgment and has obtained the windfall advantage of avoiding interest on the claim against him by his attorney and the attorneys' fees that would be due in a collection action under state law. See, Texas Civil Practice and Remedies Code, § 38.001. This has been permitted even though the plan scheduled the payment of the claim in full from a trust that was not involved in the bankruptcy proceeding, and specifically provided that if the claim (classed by

the plan as a class eight claim) were not paid from the trust the debtor would purchase the claim for the full amount due (App. 18). It is clear under Texas law that the full amount due includes interest; therefore, the Petitioner is entitled to interest under the very terms of the confirmed plan. The debtor is bound by the confirmed plan, 11 U.S.C. § 1141, and neither the debtor's wife against whom this judgment runs, or her trust, have any reason to avoid payment of interest, even if the debtor is permitted to disregard nonbankruptcy law by the abuse of the bankruptcy laws. The provision of the binding plan that provides the debtor will buy the claim for the full amount due binds the debtor to pay interest.

This Court should settle the law to be that a solvent debtor may not use the bankruptcy laws to subvert nonbankruptcy law.

Prayer

It is most respectfully prayed that this Petition be granted and that the law be settled that a solvent debtor may not use the bankruptcy laws to delay payment and avoid interest on his debts.

Most respectfully submitted,
JOSEPH COLVIN
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1017

IN THE MATTER OF: TED MARTIN AKIN,
DEBTOR.
SAMUEL D. MCDANIEL,
Appellant and
Cross-Appellee,
versus
TED MARTIN AKIN AND GLORIA DAHL AKIN,
Appellees and
Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Texas
(CA3-89-3141-G)

Before JONES and BARKSDALE, Circuit Judges and JUSTICE,[1] District Judge.[2]
PER CURIAM:

---

[1] District judge of the Eastern District of Texas, sitting by designation.

[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellant McDaniel contests the bankruptcy and district court decisions that awarded him, allegedly because of an "offset," far less than the uncontested amount of his proof of claim in Akin's Chapter 11 bankruptcy case. We reverse.

BACKGROUND

This bankruptcy case was apparently instigated in 1982 solely because Judge Akin and his wife did not want to post a supersedeas bond to avoid the judgment her father had been awarded against them in Texas state court for malicious prosecution. No one challenged the bona fides of the case, however, perhaps because Judge Akin proposed a plan to pay creditors in full following liquidation of estate properties. The plan also provided that the proceeds from Mrs. Akin's trusts would contribute to pay off creditors. According to the debtor's disclosure statement and schedules, the estate was at all times solvent, having assets of $3.5 million and liabilities of $1.7 million.

Attorney McDaniel, who represented the Akins both before and after bankruptcy and non-bankruptcy litigation, filed his objection to the plan, but it was confirmed nevertheless. The Akins never objected to his proof of claim. During the bankruptcy case and for several months after confirmation, McDaniel continued to represent the Akins on their appeals up to the Texas Supreme Court. Before confirmation, the Akins paid post-petition fees of $26,000. After confirmation, they paid additional fees of about $82,000.

In 1987 McDaniel filed suit in bankruptcy court to enforce the plan because Akin had never paid the $162,509.97 pre-petition claim filed by McDaniel.

Akin responded by contending that under the then-applicable district court authority upholding In Re Hargis, 73 B.R. 622 (Bankr. N.D. Tex. 1987), McDaniel could not claim fees for work that was performed post-petition without authorization of the bankruptcy court. This assertion by Akin threw into doubt the legality of the $109,246.36 that had been paid to McDaniel. Akin also asserted that McDaniel's claim embodies usury, because he was seeking additional amounts for fees that had not yet been paid.

The bankruptcy court felt bound by Hargis and required McDaniel to set off the post-petition fees he received against the unpaid pre-petition claim. This calculation yielded $53,263.61 without pre-petition interest. The court rejected McDaniel's request for interest and rejected Akin's usury claim. The district court affirmed, apparently not understanding that the Fifth Circuit had affirmed In Re Hargis, 887 F.2d 77 (5th Cir. 1989), clarified on rehearing 895 F.2d 1025 (5th Cir. 1990), on entirely different reasoning than that of the lower court. In this court, each party continues to urge all the issues that were previously raised.

STANDARD OF REVIEW

We review the decision of the district court by applying the same standards of review to the bankruptcy court's finding of fact and conclusions of law as applied by the district court. In re Killebrew, 888 F.2d 1516, 1519 (5th Cir. 1985). Here, Bankruptcy Rule 8013 requires that the bankruptcy court's findings of fact be subject to the clearly erroneous rule. In re Multiponics, Inc., 622 F.2d 709, 713 (5th Cir. 1980). Conclusions of law are reviewed de novo. Killebrew, 888 F.2d at 1519. However, if

the bankruptcy court premised a finding of fact upon an improper legal standard the finding of fact loses the insulation of the clearly erroneous rule. In re Missionary Baptist Foundation, 112 F.2d 206, 209 (5th Cir. 1983).

DISCUSSION

McDaniel contends that Hargis, properly read, cannot be employed to require him to disgorge or credit the post-confirmation fees he received against his unsecured, pre-bankruptcy claim. We agree. The Fifth Circuit made clear in Hargis that the bankruptcy court had no jurisdiction over a debtor's payment of funds from non-estate sources to his attorneys. Hargis, 887 F.2d at 79. In re Halls Motor Transit Companv, 889 F.2d 520, 522 (3d Cir. 1989) ("the bankruptcy court's jurisdiction does not follow the property, but rather, lapses when the property leaves the estate. ") Pettebone Corp. v. Easley, 935 F.2d 120, 122 (7th Cir. 1991) (noting that a bankruptcy is not forever. After confirmation, a debtor must normally "go about its own business without further supervision or approval" from the bankruptcy court); In the Matter of Wood, 825 F.2d 90, 93 (5th Cir. 1987) (noting that for the bankruptcy court to have jurisdiction it must have an effect of the estate being administered in bankruptcy.); Goodman v. Phillip R. Curtis Enterprises, 809 F.2d 228, 232 (4th Cir. 1987) (noting that after confirmation "matters concerning the disposition of . . . non plan assets . . . vest in the debtor"); in re TransAmerica Natural Gas Corp., 127 Br. 800, 804 (S. D. Tex. 1991).

Just as the bankruptcy court had no jurisdiction over payments made during the case from non-bankruptcy sources, it could not have jurisdiction over payments made after confirmation, where the property

of the estate is re-vested, subject to the terms of the plan, in the debtor, 11 U-S.C. § 1141(b). Here, it is undisputed that the debtor had paid all of his creditors except McDaniel at the time that he made the $82,000 post-confirmation payment for fees. The bankruptcy court's interest in this case ceased before that fee payment was made. The bankruptcy court did not properly assert jurisdiction over the debtor's use of its property after it had re-vested pursuant to the plan.

As for the $26,000 payment that was made pre-confirmation, the evidence is not clear whether this was paid from estate funds or funds provided to Akin by his father. Akin raised this matter as a counterclaim or affirmative defense to McDaniel's suit for enforcement of the plan. Akin thus bore the burden of proof, which he failed to discharge, that McDaniel had been paid from property of the estate. Because Akin did not establish the factual prerequisite for Hargis, the district court's affirmance of the offset was improper.

On the issue of post-judgment interest, we agree that no interest should have been paid on McDaniel's claim because of the solvency of the estate. The basic bankruptcy rule is that accrual of interest ceases when the bankruptcy petition is filed. United States v. Ron Pair Enterprise, 489 U.S. 235, 246, 109 S. Ct. 1026, 1033, 103 L.Ed.2d 290 (1989); Nichols v. United States, 304 U.S. 678, 682, 86 S Ct. 1674, 1678, 16 L.Ed.2d 853 (1966); Sexton v. Dryfus, 219 U.S. 339, 334, 31 S. Ct. 256, 257, 55 L.Ed. 244 (1911). It is true there are exceptions to this rule, one of which is that when the bankrupt ultimately proves to become solvent, interest may be paid on some debts. American Iron & Steel Manufacturing Co. v. Seaboard Airlines, 233 U.S. 261, 266-67, 34 S. Ct. 502, 504-505, 58

L.Ed. 949 (1914); In re Kentucky Lumber Co., 860 F.2d 674, 677 (6th Cir. 1988) (discussing the solvency exception); In re Timbers of Inwood Forest, 793 F.2d 1380, 1386-87 (5th Cir. 1986), aff'd on other grounds, sub nom; United States Ass'n v. Timber of Inwood Forest Ass'n, 484 U.S. 365, 108 S. Ct. 626, 90 L.Ed.2d 740 (1988). As far as we are aware, this exception has not been applied to permit unsecured creditors of a chapter 11 debtor to receive interest on their claims in a case like this. That is, the creditors knew before they agreed on a plan that Akin's estate was solvent, and they could have insisted upon payment of interest in the plan, but they did not do so. Further, if we were to reverse the lower courts and award interest to McDaniel at this late date, his claim would be preferred over those of other unsecured creditors. There seems little justification here for our straying from the general bankruptcy rule.

Finally, Akin's usury claim is meritless. Akin never contested the claim filed by McDaniel, and so might be said to have waived the claim of usury. Technically, the bankruptcy rules do not set out an outer date for challenging the proofs of claim. Here, however, when the plan was confirmed many years before Akin's contention was raised, a laches argument would seem appropriate. Second, and more importantly, the trial judge did not clearly err in finding that McDaniel's addition to his fees stated in his unsecured claim was the product of renegotiation rather than a charge for the use and detention of money.

We therefore REVERSE the bankruptcy and district courts and RENDER judgment for appellant for the full amount of his unsecured claim for legal services, without prejudgment interest.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

TED MARTIN AKIN, Debtor. BANKRUPTCY CASE NO. 381-00331-M-11

- - - - - - - - - - - - -

SAMUEL D. McDANIEL,
Appellant,

CIVIL ACTION NO.
CA 3-89-3141-G

VS.

TED MARTIN AKIN and
GLORIA DAHL AKIN
Appellees.

MEMORANDUM ORDER

This is an appeal from a judgment of the bankruptcy court granting recovery to appellant Samuel D. McDaniel ("McDaniel") against appellees Ted and Gloria Akin ("the Akins") in the amount of $53,263.61 but denying recovery to McDaniel for prejudgment interest and also denying Ted Akin relief on his counterclaim for usury. For the reasons stated below, the judgment of the bankruptcy court is affirmed .

I. BACKGROUND

Ted Akin filed a voluntary petition under Chapter 13 of the Bankruptcy Code on March 3, 1981, which was subsequently converted to a Chapter 11

proceeding. The bankruptcy court confirmed Akin's liquidation plan on March 2, 1983. The confirmed plan showed that attorney's fees of $162,509.97 were owed to McDaniel, as an uncontested and unsecured debt, in connection with his representation of the Akins in a number of state court cases. No payments on this debt were made under the liquidation plan. McDaniel continued to represent the Akins in ongoing state proceedings.

In March of 1987, McDaniel filed an adversary proceeding in the bankruptcy court against the Akins, seeking payment of the debt shown in the liquidation plan plus interest for the delay in payment. On June 2, 1989, the bankruptcy court conducted a hearing on the matter and concluded that McDaniel's debt was allowable in the amount claimed without interest, that post-petition payments received by McDaniel were to be set-off against the allowed claim, that Ted Akin's usury claim was unmeritorious, and that recovery on the judgment in favor of McDaniel could be had against both Ted and Gloria Akin. McDaniel then filed a motion to amend the findings and order, which the bankruptcy court denied. This appeal followed.

II. ANALYSIS

A. Standard of Review

On this appeal, the findings of fact made by the bankruptcy court are reviewed under the clearly erroneous standard enunciated in Bankruptcy Rule 8013, and the conclusions of law adopted by the bankruptcy court are reviewed *de novo*. *Matter of Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1252 (5th Cir.1986); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1307-08 (Sth Cir. 1985).

B. Issues on Appeal

McDaniel contends that the bankruptcy court erred in applying post-petition payments received from Ted Akin against the debt owed under the liquidation plan. He maintains that these payments were for post-petition services and that the source of these payments was from non-estate assets; therefore, he concludes, the payments should not be set-off against the debt owed under the liquidation plan. McDaniel further asserts that the bankruptcy court erred in refusing to allow pre-judgment interest on the debt.

The Akins respond that the bankruptcy court was correct in allowing the set-off of the post-petition payments against the debt and in denying pre-judgment interest. They cross appeal the bankruptcy court's denial of Ted Akin's usury counterclaim and its finding that Gloria Akin is also personally liable on the debt.

1. Set-off

The bankruptcy court found that the debt claimed by McDaniel was scheduled by Ted Akin as undisputed and unsecured in the amount of $162,509.97, which included a ten-percent increase in previously billed fees,[1] and that the liquidation plan confirmed by the bankruptcy court in Akin's Chapter 11 bankruptcy case provided that this debt was to be paid in full. It concluded, therefore, that McDaniel was entitled to receive the scheduled amount of the debt

---

[1] Between May 1980 and February 1981, McDaniel billed Ted Akin $147,736.34 for attorney's fees. By agreement between the parties, this amount was increased by ten-percent to reflect the delay in payment, so that the scheduled amount became $162,509.97.

pursuant to the plan. Additionally, the bankruptcy court found that Akin made post-petition payments to McDaniel totalling $109,246.36 and that such payments should be set-off against the scheduled amount, leaving a balance due on the debt of $53,263.61. The bankruptcy court reasoned that such treatment of the post-petition payments was required by the holding of this court in *In re Hargis*, No. 87-1563 (N.D. Tex. Jan. 26, 1989).

McDaniel asserts that the bankruptcy court, while correctly assessing the pre-petition amount owed as $162,509.97, erred in applying Akin's post-petition payments against this pre-petition, scheduled debt. He bases his assertion on the Court of Appeals' reversal of this court's decision in *Hargis*. *Matter of Hargis*, 887 F.2d 77 (5th Cir. 1989), *opinion clarified on rehearing*, 895 F.2d 1025 (1990). Akin argues that the judgment of the bankruptcy court should be affirmed notwithstanding the reversal in *Hargis*, because the reversal was on grounds not applicable to this case.

This court held in *Hargis* that attorneys' fees charged and paid post-petition were subject to disgorgment where the charging attorney did not receive approval from the bankruptcy court, pursuant to 11 U.S.C. § 328(c), for the continuation of services post-petition. Consequently, it affirmed the order of the bankruptcy court that such fees be returned. The Fifth Circuit reversed, holding that disgorgment was not required in those instances where the fees were paid out of non-estate assets; therefore, the general rule that approval by the bankruptcy court is required before an attorney can recover fees for post-petition services was not applicable. *Matter of Hargis*, 887 F.2d at 79-80.

Here, the bankruptcy court was correct in holding that Akin's post-petition payments should be set-off against the pre-petition debt. The Fifth Circuit's decision in *Hargis* is not applicable here, as it left intact the general rule requiring approval of the bankruptcy court before an attorney for the debtor can recover payment from the estate for post-petition legal services. Indeed, it is unclear whether, under the general rule, McDaniel is entitled to any payment for post-petition services without the approval of the bankruptcy court. The bankruptcy court correctly stated that "if Mr. McDaniel provided any post-confirmation legal [services] that have not been paid or that are deemed unpaid by the Court's application of the funds that have been given, that's simply a matter for another jurisdiction."[2] The bankruptcy court did not err, in consequence, when it credited the post-petition payments against the fees shown in the plan.

2. Pre-Judgment Interest

The bankruptcy court found that because no objection to the characterization of the claimed debt as unsecured was filed until five years after confirmation, McDaniel's recent objection to such characterization was untimely. On that basis, it declared that the provisions of 11 U.S.C. § 506, which allows pre-judgment interest on over-secured claims, were not applicable and that, as a result, McDaniel was not entitled to pre-judgment interest on the scheduled debt. The bankruptcy court also concluded that McDaniel was not entitled to prejudgment interest on the theory of delay in payment because the confirmed Chapter 11 plan, which did not provide for the payment of post-

[2] Transcript of June 2, 1989 hearing at 104.

confirmation interest, controlled. The court likewise denied McDaniel's claim for recovery of interest under 11 U.S.C. § 727,[3] holding that section 727 applies only in Chapter 7 bankruptcy cases.

The bankruptcy court properly held that McDaniel's objection to the characterization of his debt as unsecured was untimely. That court was equally correct in holding that McDaniel is bound by the provisions of the liquidation plan, which did not provide for post-petition interest. McDaniel did not object to confirmation of the plan, and his attempt to do so now comes too late. For these reasons, the bankruptcy court did not err in denying McDaniel's claim for postpetition interest.

3. Usury

The court denied Ted Akin's counterclaim for usury on the ground that the increase in attorney's fees from the amount originally billed to the scheduled amount constituted a renegotiation of legal fees and not a payment of interest. The court further found that McDaniel's claim for pre-judgment interest in the adversary proceeding was an attempt by McDaniel to recover interest through litigation rather than a charge of interest pursuant to a credit agreement. Applying the Texas law of usury as declared by the Fifth Circuit in *Gibraltar Savings v. LDBrinkman Corp.*, 860 F.2d

---

[3]McDaniel asserts that Akin was solvent at all times before, during, and after the bankruptcy proceeding, an assertion that Akin disputes. Because the bankruptcy court correctly held that section 727 is not applicable to a Chapter 11 case, a resolution of this factual dispute is not necessary.

1275, 1296-97 (5th Cir. 1988), *cert. denied, 490* U.S. 1091 (1989), the court concluded that such an attempt did not therefore "lead to a finding of usurious interest."[4]

Because the bankruptcy court correctly applied the Texas law of usury as expounded by the Fifth Circuit, the bankruptcy court's denial of relief on Akin's usury counterclaim must be affirmed.

C. Gloria Akin's Cross-Appeal

The bankruptcy court found that Gloria Akin, by signing the plan and disclosure statement, became a proponent of the plan and thereby submitted herself to its jurisdiction. The court held that because confirmation of the plan gives rise to a contractual obligation on the part of the debtor, this obligation is also imposed on any other party-proponent such as Gloria Akin.

The parties have cited no authority for the proposition that the bankruptcy court erred in so holding, nor has this court found such authority. Accordingly, the bankruptcy court's ruling as to the signature liability of Gloria Akin is affirmed.

III. CONCLUSION

For the foregoing reasons, the judgment of the bankruptcy court is **AFFIRMED**.

SO ORDERED.

December 6, 1991

A. JOE FISH
United States District Judge

---

[4]Transcript of June 2, 1989 hearing at 101.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

TED MARTIN AKIN, Debtor. BANKRUPTCY CASE NO. 381-00331-M-11

SAMUEL D. McDANIEL,
Appellant,

CIVIL ACTION NO.
CA 3-89-3141-G

VS.

TED MARTIN AKIN and
GLORIA DAHL AKIN
Appellees.

JUDGMENT

This case was submitted on the record and the briefs of the parties. On consideration whereof, it is **ORDERED** that the judgment of the bankruptcy court is **AFFIRMED.**

December 6, 1991.

A. JOE FISH
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
TED MARTIN AKIN	§	CASE NO. 381
DEBTOR	§	00331-RCM-11
SAMUEL D. MCDANIEL	§	
VS.	§	ADVERSARY NO.
TED MARTIN AKIN	§	387-3183-SAF
GLORIA DAHL AKIN	§	
LILLIE DAHL TRUST	§	

JUDGMENT

At Dallas, Texas, in said district, on the 2nd day of June 1989, came on for consideration the above-captioned matter and the issues having been heard by the Court,

IT IS ORDERED AND ADJUDGED, that the Plaintiff recover from the Defendants, Ted Martin Akin and Gloria Dahl Akin, the sum of $53,263.00 with interest thereon at the rate of 9.15% as provided by law.

SIGNED this 3rd day of July, 1989.

S/ Steven A. Felsenthal
STEVEN A. FELSENTHAL
United States Bankruptcy Judge

ENTERED
JUL 3 1989
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 92-1017
IN THE MATTER OF: TED MARTIN AKIN,
DEBTOR.
SAMUEL D. MCDANIEL,
Appellant and
Cross-Appellee,
versus
TED MARTIN AKIN AND GLORIA DAHL AKIN,
Appellees and
Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Texas
(CA3-89-3141-G)

ON PETITIONS FOR REHEARING
(December 8, 1992)

Before JONES, BARKSDALE, Circuit Judges and JUSTICE,* District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby Denied.

ENTERED FOR THE COURT:

S/ Edith H. Jones 12/4/92
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	CASE NO.
TED MARTIN AKIN	§	381-00331-F (11)
DEBTOR	§	

PLAN OF REORGANIZATION

1.
CLASSIFICATION AND IDENTIFICATION OF CLAIMS

CLASS ONE: All claims secured by a first lien deed of trust upon apartment house at 5816 McCommas.

CLASS TWO: All claims secured by a first lien deed of trust upon property at 3328 N. Beckley.

CLASS THREE: All claims secured by a second lien deed of trust upon 5816 McCommas and 3328 N. Beckley.

CLASS FOUR: All claims arising from exercise of option to purchase of four acres in Quitman, Arkansas.

CLASS FIVE: All claims arising from guarantee of note of Laurel Aken secured by 1979 Scirocco automobile.

CLASS SIX: All claims secured or purported to be secured by an abstract of judgment lien.

CLASS SEVEN: All unsecured claims now payable by their terms in annual installments.

CLASS EIGHT: All claims which are primary obligations of the Lille E. Dahl Trust.

CLASS NINE: All other claims including unsecured claims whether direct or indirect, primary or secondary.

2.

PROVISIONS FOR PAYMENT OF CLAIMS

CLASSES ONE THROUGH FIVE: All of these claims will be ratified, retain their same collateral and rights, and cured to the extent applicable.

CLASSES SIX AND NINE: These claims will be paid in full and in cash from the liquidation proceeds as set out below.

CLASS SEVEN: Class Seven claims will be paid in accordance with their terms, and cured to the extent applicable.

CLASS EIGHT: If not already paid by the primary obligor, the debtor will purchase each of these claims for the full amount due. Acceptance of payment tendered by the debtor will constitute an assignment without recourse or warranty by the claimant to the debtor.

3.

DISPUTED CLAIMS

Certain claims herein are disputed as indicated in the schedules. The major disputed accounts or claims are those of George L. Dahl, Edward Janus, and A & M General Contractors. These claims will be paid only when there is either an allowed proof of claim or final judgment establishing liability.

4.

LIQUIDATING PLAN

It is the intention of the debtor to liquidate as much as may be required of his scheduled assets of $3,548,591.92 in order to pay the amount of cliams which are finally established to be due and owing.

For that purpose, and to provide adequate means for the Plan's execution, the debtor will retain all scheduled property of the estate.

5.

The liquidation efforts of the debtor will begin as soon as the initial opinion of the Court of Civil Appeals is issued so that the amount of the liabilities can be ascertained. This is true even though the appellate efforts will probably continue by either Dahl or Akin or both.

6.

Until such time as all unsecured creditor claims have been paid in full, sales in liquidation will be confirmed only upon report to the Court, notice and hearing.

7.

RETENTION OF JURISDICTION

The Court will retain full jurisdiction over the liquidation pursuant to this Plan until such time as all allowed unsecured claims have been paid in full.

8.

CURE OF DEFAULTS

To the extent there is any default in any claim of Classes One through Four the same will be cured upon confirmation.

9.

EXECUTORY CONTRACTS

The debtor ratifies his executory contract of purchase with W. B. Yarbrough to purchase 4 acres in Quitman, Arkansas and exercises that option.

S/ Ted M. Akin
Ted M. Akin
S/ Gloria D. Akin

PALMER, PALMER & COFFEE
By: Philip I Palmer, Jr.
840 One Main Place
Dallas, Texas 75250
(214) 748-1211

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	CASE NO.
TED MARTIN AKIN	§	381-00331-F
DEBTOR	§	

AMENDED DISCLOSURE STATEMENT

1.

FINANCIAL BACKGROUND

The total claims scheduled are $1,771,269.83, of which $1,195,482.30 are disputed as to liability. An additional $234,512.38 are scheduled as obligations upon which the debtor acknowledges liability but contends the primary obligor is the Lille E. Dahl Trust.

2.

The Debtor is now and has always been solvent, with scheduled assets of $3,538,591.92. No value is listed upon the schedules for the interest of the wife, Gloria D. Akin, as primary life-time beneficiary of the Lille E. Dahl Trust nor for the judgment which she holds against George L. Dahl in the amount of $274,702.26. The major asset, in terms of value, is the Debtor's homestead at 5323 North Dentwood Drive, which is valued at $2,000,000.00 It is unencumbered. Other valuable assets, all of which are encumbered, are 12,000 shares of stock in Hargrove Electric Company, valued at least at $50.00

per share ($600,000.00); an improved lot at 3328 North Beckley, rented to AMFAC ($275,000.00); an 8-unit apartment house at 5816 McCommas ($200,000.00); and a judgment against George L. Dahl for $105,863.40 plus interest and attorneys' fees. All values stated are those of the Debtor, without formal appraisals. George L. Dahl does not agree with the values and has asserted that they are too high.

3.

DAHL LITIGATION

There are four litigated matters on appeal in the Dahl-Akin controversies, including all three money judgments (the two against Dahl and the one against the Akins) and the judgment, inter alia, removing Dahl as Trustee. All matters were presented on oral argument to the Texas Court of Civil Appeals at Amarillo on December 7, 1981. It is anticipated that the parties which do not prevail will continue the appellate process. It is not at all impossible for no single party to win on every point presented, but the several judgments could be affirmed in part, reversed in part, reduced, modified or even returned for new trial.

4.

Although the results of the appeal cannot be foretold with mathematical exactitude, it is the intent of the debtor and the essence of the Plan, that liquidation shall commence with the decision of the Court of Civil Appeals. If Dahl substantially prevails, then it will require selling the property at 5323 North Dentwood Drive. To the extent that further liquidation should be required to effect the 100% payment under this Plan the debtor will promptly do so, reserving to himself, however, the right to

designate the priority in which assets will be sold and the prices to be received, subject however to the information of the Bankruptcy Court pursuant to the retained jurisdiction provisions.

5

SUMMARY OF PLAN

The Plan calls for a 100% cash payment from liquidation proceeds. Disputed claims will be paid only when the dispute is finally concluded with a final judgment. It is the intention of the debtor, however, to establish a reserve account in the amount of such net liability, if any, as may be established against him by the Court of Civil Appeals even if further appeals continue.

6.

Claimants which hold those claims scheduled as being primary obligations of the Lille E. Dahl Trust will be paid in full, but the payment will be deemed an assignment of the claim without recourse or warranty for such future recoupment, if any, which the debtor may obtain from the Trust.

7.

IDENTIFICATION OF CLASSES

This identification represents only the opinion of the debtor and is not binding upon any claimant. Also, a claimant may be partly in one class and partly in one or more other classes.

CLASS ONE: First lien, 5816 McCommas. Dallas Federal Savings and Loan Association.

CLASS TWO: First lien, 3328 N. Beckley, either State Life Insurance Company, or Jerry Frey Mortgage Co., or both in some participation.

CLASS THREE: Second lien, 5816 McCommas and 3329 N. Beckley, Ted Akin.
CLASS FOUR: Claims arising from exercise of option to purchase four acres in Quitman, Arkansas. First National Bank of Conway, Arkansas, plus W. B. Yarbrough by holding harmless from note executed by Yarbrough to grantors.
CLASS FIVE: Guarantee of secured note of Laurel Akin, Dallas County Employees Credit Union.
CLASS SIX: Claims secured by alleged abstract of judgment lien, George L. Dahl.
CLASS SEVEN: Unsecured last annual installment obligation. Meta Frame Corporation.
CLASS EIGHT: Primarily obligations of Lille E. Dahl Trust. Akin, Gump, Strauss, Hauer & Field; Carrington, Coleman, Sloman and Blumenthal; Beverly E. Dixon; Ewbank, Willson and Co.; James P. Grigson, M.D.; Samuel D. McDaniel; Vial, Hamilton, Koch, Tubb, Knox and Stradley; Sherry White; and Thomas A. Woods, M.D.
CLASS NINE: All other claims: A & M Contractors; Haley, Winfrey & Depp; James D. Shonts; Edward Janus, and any other creditor not already names elsewhere.

8.

TIME OF LIQUIDATION

If the Dahl claim prevails without at least some substantial reduction, the Dentwood property has to be sold. It is the consensus of reputable brokers that those residential properties in the price range in excess of $1,000,000 have a more active market than those in the $300,000 to $600,000 market, doubtless beacuse prospects in that price range have less need for outside financing. Just how long, however, it will take before

an acceptable offer will be received from a responsible buyer is pure speculation and just cannot be foretold with any accuracy. There will be a status conference held on liquidation progress before the Bankruptcy Court at least once every six months following confirmation until all creditors are paid.

9.

On the other side of the coin, if the Debtor and his wife prevail upon substantially all points, then no real liquidation will be required. The judgments which each holds against George L. Dahl, neither of which have supersedeas bonds, are by themselves sufficient to satisfy all claims.

TED M. AKIN
GLORIA L. AKIN

PALMER, PALMER & COFFEE
By: Philip I. Palmer, Jr.
840 One Main Place,
Dallas, Texas 75250
(214) 748-1211

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	CASE NO.
TED MARTIN AKIN	§	381-00331-F
DEBTOR	§	

ORDER CONFIRMING PLAN

The Plan under Chapter 11 of the Bankruptcy Code filed by Ted Martin Akin and the Plan having been transmitted to creditors; and

It having been determined after hearing on notice:

1. That the Plan has been accepted in writing by the creditors whose acceptance is required by law; and

2. That the provisions of Chapter 11 of the Code have been complied with, that the Plan has been proposed in good faith and not by any means forbidden by law; and

3. Each holder of a claim will receive or retain under the Plan property of a value as of the effective date of the Plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under Chapter 7 of the Code on such date; and

4. The Plan does not discriminate unfairly, and is fair and equitable with respect to each class of claims that is impaired under and has not accepted the Plan; and

5. All payments made or promised by the debtor have been fully disclosed to the Court and are

reasonable or, if to be fixed after confirmation, will be subject to the approval of the Court; and

6. Confirmation of the Plan is not likely to be followed by the need for further financial reorganization of the debtor.

IT IS ORDERED that the Plan filed by Ted Martin Akin, a copy of which Plan is attached hereto, is confirmed.

SIGNED this 2 day of March, 1983.

S/ John Ford
United States Bankruptcy Judge

Letterhead Palmer, Palmer & Coffee
Law Offices
840 One Main Place
Dallas, Texas 75250
Area code (214) 748-1211

December 8, 1983

Mr. Samuel D. McDaniel
MCDANIEL & TRAVIS
1020 First City National Bank Building
Austin, Texas 78701

Re: Offset - Ted Akin
Dear Sam:
Actually, Gloria never filed for relief under the Bankruptcy code. Although considered, my recollection is that there was concern for her ability to tolerate the badgering and harassment that would necessarily result at such times as creditors' meetings. Secondly, at the time it was important to maintain her eligibility to serve as a trustee under the Texas Trust Act, which would be lost if she filed.

We could, perhaps, counter that if we wanted to make the argument that her judgment is a community asset and thus included in Ted's estate. It would be a bit ticklish, perhaps, since it would be a reverse of our earlier position and how we have scheduled the assets thus far.

As for offsets, in general, under the Bankruptcy Code, the Old Act (which allowed them freely) was changed to forbid them without court approval barring court

order. This was accomplished by not excluding offsets from the automatic stay in 11 U.S.C. §762. The stay, however, terminates with confirmation of the Plan since the debtor is then discharged of all debts to the extent they are not set out in the plan. The stay, in other words, is over for Ted.

My personal feeling that the practicalities are that it is not important. If the judgment was not reversed, then Ted would have to pay. The only benefits of the Chapter 11, and these are not inconsiderable, was to substitute the stay for a supersedeas bond so as to halt the harassment during the appeal and then, if lost, allow Ted to handle his own sale of property upon a reasonable basis to satisfy the judgment.

Your recollection that no interest runs after filing a Chapter 11 is a correct statement of the general rule, but two of the exceptions are applicable here. If the claim is secured and if there is equity, then interest runs until payment (11 U.S.C. § 506) or if the debtor is solvent (11 U.S.C. §726).

In sum, then, the sale appears to be near at which time the Akins as a group will settle accounts. It all seems to come out exactly the same, whether by crossed checks or offset, and I would think it would just be needless legal expense to make something out of the offset, but I will do as you all wish.

Sincerely yours,

PALMER, PALMER & COFFEE

By Philip I. Palmer, Jr.

cc: Honorable Ted M. Akin